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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957.

DOCKET No. 445.

LLOYD W. McCORKLE, Principal Keeper of the New Jersey State Prison at Trenton, New Jersey,

Petitioner,

vs.

UNITED STATES OF AMERICA, *ex rel.* SILVIO DeVITA,

Respondent.

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI.

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To the Honorable Earl C. Warren, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Lloyd W. McCorkle, Principal Keeper of the New Jersey State Prison at Trenton, New Jersey, your petitioner, prays that this Court grant rehearing of its Order of November 12, 1957, denying the petition for a writ of certiorari and that a writ of certiorari issue to review the judgment of the Court of Appeals for the Third Circuit in the above-entitled case as prayed for in the petition filed September 9, 1957, herein.

Reasons for Rehearing of Order Denying Petition for Certiorari.

1. We deem it necessary to present to the Court a very brief summary of the procedural steps undertaken in this case.

On March 12, 1952, Silvio DeVita, Joseph Grillo, and Ralph Rosania were tried and convicted of murder in the first degree in the Essex County Court, New Jersey, the crime being a felony-murder, the killing of James Law, a special police officer, on November 9, 1951, in Newark, New Jersey, committed during the perpetration of robbery.[1]

The jury, by its verdict, recommended life imprisonment as to Rosania only, but there was no recommendation as to DeVita and Grillo who were sentenced to the death penalty.

The judgment of conviction was affirmed by the New Jersey Supreme Court (*State* v. *Grillo*, 11 N. J. 173, 93 A. 2d 328); and this Court denied certiorari. (*DeVita & Grillo* v. *New Jersey*, 345 U. S. 976, 73 S. Ct. 1123).

Thereafter DeVita undertook two successive habeas corpus proceedings culminating in this Court without success, one involving an attack upon the manner of polling the trial jury and the sentence imposed (See *In re DeVita*, 27 N. J. Super. 101; *In re DeVita*, 13 N. J. 341; certiorari denied 346 U. S. 923, 74 S. Ct. 309); and the other an application to this Court for leave to file a writ of habeas corpus based upon the Charter of the United Nations, which

[1] The deceased was killed while in the act of escorting the manager of a super-market to a bank to deposit a substantial sum of money for his employers.

was denied. (See *DeVita* v. *McCorkle*, 347 U. S. 926, 74 S. Ct. 534).

Beginning on March 15, 1954, both DeVita and Grillo commenced another round of proceedings in the New Jersey courts, claiming they were denied a fair and impartial trial because of the presence on the trial jury of one Arthur Kuhnle who was discovered after trial to have been himself a victim of armed robbery.[2]

The trial court denied a new trial, and on appeal the New Jersey Supreme Court, after considering and determining the constitutional questions involved, affirmed the denial of a new trial. (See *State* v. *Grillo*, 16 N. J. 103.)

Execution of DeVita and Grillo was fixed for the week of August 15, 1954.

It is important to note that immediately prior to that date, on August 13, 1954, counsel for DeVita served upon the county prosecutor a notice of application they intended to make to this Court for a stay of execution in order to permit the filing in this Court of a petition for a writ of certiorari to review the judgment of the New Jersey Supreme Court, it being stated in paragraph 1 of said application that:

> "This application is made in conjunction with a petition which the applicant intends to file promptly with this Court for certiorari to review a certain final state court judgment which is hereinafter more fully described. If the stay of execution of sentence of death herewith applied for is granted by this Court, the applicant will file his petition for certiorari as

(2) Juror Kuhnle was the victim of a robbery on March 31, 1951, almost a year before the murder trial.

aforesaid within the time prescribed by law, or at such time as this Court may direct."

On or about August 13, 1957, counsel for DeVita proceeded to Washington, D. C. for the purpose of presenting an application for a stay of execution pending their avowed intention of filing a petition for certiorari in this Court.

Although the county prosecutor was not present at the time of the application for a stay of execution, he was reliably informed that the application for a stay was presented to the Honorable Associate Justices Hugo L. Black, Robert H. Jackson and Tom C. Clark, and upon considering the merits of the application which was based upon the presence on the jury of Arthur Kuhnle, and which contained all of the details in connection with the alleged bias and prejudice of said juror as has been considered and determined by the New Jersey Supreme Court, each of the named Associate Justices denied a stay of execution.

On August 16, 1954, apparently abandoning any intention of filing in this Court a petition for certiorari to review the New Jersey Supreme Court, DeVita filed a petition for a writ of habeas corpus in the United States District Court for the District of New Jersey, in which he made the following significant statement in paragraph 21 of his petition:

> "As regards petitioner's right to petition to the Supreme Court of the United States for a writ of certiorari to review the last-mentioned judgment of the Supreme Court of New Jersey, petitioner does desire to make such application to the Supreme Court of the United States, and in pursuance of this desire petitioner has attempted to obtain a stay of execution of his sentence of death in order to permit him

the opportunity of filing and prosecuting his petition for a writ of certiorari in the Supreme Court of the United States. Such application for a stay of execution pending the filing of a petition for a writ of certiorari has thus far proved fruitless."

On August 16, 1954, the same day of defendants' application for a writ of habeas corpus, the District Court judge, after examining the opinion of the New Jersey Supreme Court in 16 N. J. 103, dismissed the petition, but he issued a certificate of probable cause entitling defendants to an appeal.

On appeal, the Court of Appeals remanded the cause to the District Court for further proceedings directing that the Court examine and consider the "entire record" of the State courts pursuant to *Brown* v. *Allen*, 344 U. S. 443, 73 S. Ct. 397 (1953). (See *United States* v. *McCorkle*, 216 F. 2d 743).

Pursuant to the direction, the District Court, on remand of the case, thoroughly examined and considered the entire record of the New Jersey state courts, and it concluded that the federal questions involved had been adequately considered and determined by the New Jersey Supreme Court, and on July 25, 1955, the District Court dismissed the petition for habeas corpus. (See *United States* v. *McCorkle*, 133 F. Supp. 169).

On appeal, oral argument was had before a three-judge Court on February 9, 1956.

Thereafter a re-argument was had before the entire seven-judge Court of Appeals on January 9, 1957.

On August 6, 1957, and by amended judgment of August 19, 1957, the Court of Appeals reversed the judgment of the District Court and directed the issuance of a writ of habeas corpus to the end that a new trial be allowed.

The reversal by the Court of Appeals for the Third Circuit was by a vote of four to three.

This reversal was singularly adverse to the petitioner in a constant series of judicial reviews, in both the State and Federal Courts, since March 12, 1952, and on the identical question here presented since March 15, 1954, all of which reviews were initiated in behalf of the respondent.

While we cannot refer to any new and conflicting decision of another court of appeals, or any controlling Supreme Court decision since the filing of our petition for certiorari on September 9, 1957, we respectfully submit that the matters herein set forth as a ground for rehearing comes legitimately within the purview of Supreme Court Rule 58 (2) as a substantial reason for further consideration by this Court, although it was not previously presented in the petition heretofore filed and denied.

Conclusion.

For the reasons set forth above and in the petition for writ of certiorari, it is respectfully urged that rehearing be granted and that, upon such rehearing, a writ of certiorari issue to the Court of Appeals for the Third Circuit.

Respectfully submitted,

CHARLES V. WEHR, JR.,
Counsel for Petitioner.

Certificate of Counsel.

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58 (2) of the rules of this Court.

CHARLES V. WEBB, JR.,
Counsel for Petitioner.